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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~956~~ 70-38

FEDERAL POWER COMMISSION, *Petitioner*

v.

FLORIDA POWER & LIGHT COMPANY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE AND BRIEF OF GAINESVILLE UTILITIES DEPARTMENT AND CITY OF GAINESVILLE, FLORIDA

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FLORIDA POWER & LIGHT COMPANY

ON PETITION FOR A WRIT OF CERTIORARI
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Gainesville Utilities Department and the City of Gainesville, Florida (Gainesville), hereby respectfully move for leave to file the accompanying brief in this case as *amicus curiae* in support of the petition for certiorari filed by the Federal Power Commission in the above captioned proceeding. The Solicitor General has consented to the filing of the brief, but the attorneys for respondent, Florida Power & Light Company (FPL), have refused consent.

The City of Gainesville owns an electric generating transmission and distribution system located in Alachua County, Florida. This system, which is operated by Gainesville Utilities Department, serves some 22,000 customers within and

outside the City in competition with Florida Power Corporation. Since Gainesville has been operating in isolation with a rapidly growing load, entry into the Florida power pool in which FPL is the largest member would be highly beneficial to the public served by Gainesville by making available to it the many and valuable benefits available through such pool operation.

Prior to the filing of the complaint which culminated in the Commission's decision in *Gainesville v. Florida Power Corp.*, 40 FPC 1227, reversed in part, 425 F.2d 1196 (5th Cir., 1970), pending on writ of certiorari, No. 464 this Term, Gainesville sought to obtain such access through interconnection with FPL. However, FPL was unwilling voluntarily to interconnect with Gainesville. Accordingly, since FPL had not yet been found to be a "public utility" subject to Commission regulation under the Federal Power Act, Gainesville by complaint filed with the Commission sought interconnection with Florida Power, an admitted "public utility" under the Federal Power Act.

Even should this Court in No. 464 reinstate the terms and conditions prescribed by the Commission in directing Florida Power to interconnect with Gainesville, Commission jurisdiction over FPL would still be of vital concern to Gainesville. Not only may further Commission action be required in order to obtain appropriate participation for Gainesville in the Florida pool, but Gainesville's relation with FPL within the pool may call for Commission supervision. In any case, quite apart from the Florida pool itself, Gainesville's close proximity to FPL lines makes it highly desirable for Gainesville also to interconnect and operate in coordination with FPL; and Gainesville's past experience strongly indicates the need for an exercise of Commission jurisdiction in order to bring even a limited interconnection between FPL and Gainesville into being.

Gainesville, thus, has a vital interest in the question whether FPL is a public utility under the Federal Power Act presented by the Commission's petition herein. Gaines-

ville, therefore, respectfully requests the Court to grant it leave to file the attached brief *amicus curiae* in support of the Commission's petition for writ of certiorari.

Respectfully submitted,

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BRIEF OF GAINESVILLE UTILITIES DEPARTMENT, CITY OF GAINESVILLE, FLORIDA, AS AMICUS CURIAE

By leave of this Court, Gainesville Utilities Department and the City of Gainesville, Florida (Gainesville), file this brief as *amicus curiae* prior to the consideration of the petition for writ of certiorari of the Federal Power Commission in the above-captioned proceeding.

INTEREST OF AMICUS CURIAE

As set out in the attached motion, Gainesville has a vital interest in the status of Florida Power & Light Company

(FPL) under the Federal Power Act even should this Court in No. 464 reinstate the terms and conditions prescribed by the Commission in directing Florida Power to interconnect with Gainesville. Not only may Commission action still be required for Gainesville to obtain appropriate participation in the Florida pool in which FPL is the largest member, but Gainesville's relationships with FPL within the Pool may call for Commission supervision. In any case, quite apart from the Florida pool itself, it would be in the public interest in light of Gainesville's close proximity to FPL lines, for Gainesville to interconnect and operate in coordination with FPL.

ARGUMENT

In this case, the Commission has found that FPL, although wholly located within the State of Florida, transmits power in interstate commerce and hence is a "public utility" subject to Commission regulation under the Federal Power Act. The Fifth Circuit has set aside that determination, and the Commission's petition for a writ of certiorari demonstrates, we submit, that review by this Court is fully warranted. While we adopt in substance the Commission's petition, we believe that the following additional considerations serve to reinforce the Commission's petition:

1. The holding below fails to take into account that, as pointed out by the Commission (Pet. App. C, p. 47), FPL has been operated in such a way as to receive "substantial benefits from its participation in the Florida pool in the coordination of spinning reserves, the assurance of reliability of frequency control and from both the Florida Pool and ISG[1] in the form of automatic assistance in the case of

[1] Interconnected Systems Group, consisting of 140 interconnected utilities spanning the southeastern and central portions of the United States (Pet. App. C, p. 42).

emergencies."[2] The extent of FPL dependence on Florida Pool and ISG is indicated by the minimal level of FPL's reserve as reported by the Commission's Bureau of Power (Preliminary Report on Winter 1970-1971 Load Supply Situation (p. 4)):

> "Overall the Florida Power Pool appears to have satisfactory reserves. One member, Florida Power and Light Company is short of reserves with projected 392 mw or 7.5 percent reserve margin. Due to transmission limitations only limited help could be brought into the area should plants in the Miami area suffer high forced outages."

2. The approach of the Court below is also patently inconsistent with those of the Sixth, Seventh and Eighth Circuits in *Public Service Co. of Indiana Inc. v. FPC*, 375 F.2d 100 (7th Cir. 1967), *cert.* denied, 387 U.S. 931; *Cincinnati Gas & Electric Co. v. FPC*, 376 F.2d 506 (6th Cir. 1967), *cert.* denied, 389 U.S. 842; *Indiana & Michigan Electric Co. v. FPC*, 365 F.2d 180 (7th Cir. 1966), *cert.* denied, 385 U.S. 972; *Arkansas Power & Light Co. v. FPC*, 368 F. 2d 376 (8th Cir. 1966).

The Commission in this case has placed heavy reliance upon its findings with regard to "electromagnetic unity".[3] As found by the Commission, subject to the limitation of the interconnections, the power generated by FPL moves in interstate commerce as a result of "electromagnetic unity" with the 140 interconnected utilities making up ISG under which the generating units of the interconnected companies

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[2] Although the assistance available to FPL from ISG is limited by the 100 mw capacity of the interconnection, 12 of FPL's 24 generating units generate 75 mw or less and the emergency outage of any one of these units would automatically bring assistance to FPL (see Pet. App. C, p. 42).

[3] As noted in the Petition (at pp. 7-8), the Commission's finding that FPL transmitted power in interstate commerce is also based on the application of the commingling method of tracing (see Pet. App. D, pp. 80-82).

are synchronized and operated in parallel; those generating units, accordingly, are all interlocked electromagnetically with the result that the addition of a load on one part of the system simultaneously affects every generating unit in the system (Pet. App. C, pp. 42-43; App. D, pp. 70-79). The Fifth Circuit brushed these findings aside as inadequate and inconclusive, ruling that (Pet App. A, pp. 23-24):

> "* * * the complex relationship of cause and effect in interconnected and synchronized systems is, as to FPL, not sufficient to prove the actual transmission of energy interstate. It tells us what, as to that company, could occur. It does not tell us with any substantial degree of certainty what does occur."
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> * * * * *
>
> "* * * The Commission referred * * * to FPL's contribution of 8 mw to ISG during an outage in the midwest. The 'contribution' does not necessarily mean that power was transmitted interstate from FPL to the midwest. Although the effect of FPL's transmission was to increase the total wattage available to the whole system, the 'electromagnetic unity of response' theory is equally compatible with either the Commission's 'permeation' assumption or the hypothesis that the power transmitted by FPL was consumed by Corp, another eight mw being passed on by Corp for further use or transmission."

In contrast, in the *Indiana & Michigan* case, the Seventh Circuit, after explaining—in terms closely paralleling those of the Commission and Examiner here—that as an ISG member, the Company's generators operated in electromagnetic unity with those of other ISG members, the Seventh Circuit ruled (365 F.2d at 184).

> "The unpredictable and free-flow of energy in the System in response to any number of constantly changing occurrences, makes it certain, in the view of the Federal Power Commission that out-of-state energy received by I&M at a number of points at or near its eastern, southern or western borders, at one time

or another, reaches each of I&M's wholesale customers.

"We hold the Commission was justified, based upon expert opinion evidence and otherwise, in holding the sales by I&M to its wholesale customers were in interstate commerce and were subject to the jurisdiction of the Federal Power Commission.

* * * * *

"'We reject I&M's fundamental proposition in this case that in order to prevail, the Federal Power Commission must do what I&M claims to be impossible, that is, to prove by either tracing or some other unnamed 'scientific and engineering proof' that out-of-state energy reaches the wholesale customers. We might recall that even in criminal cases, guilt beyond a reasonable doubt often can be established by circumstantial evidence."

And, in *Public Service of Indiana*, where the Company again was an ISG member and the Commission found, in terms very similar to those in the instant proceeding, that the Company's generators operated in electromagnetic unity with those of the other ISG members (see 34 FPC 1513, 1515-1516), the Sixth Circuit held (375 F.2d at 102-103):

"The ultimate finding of the Commission upon which it asserted jurisdiction is substantially that PSCI's interconnections with other public utilities locates it in a 'large power pool' from which PSCI receives 'large quantities' of out-of-state energy resulting in 'pool sales' subject to Commission regulation.

"PSCI contends that there is no substantial basis in the record for the conclusion that its sales were in interstate commerce because the Commission did not employ point-to-point tracing studies as in many previous cases. The Commission's test, it argues, was an arbitrary nonscientific 'power pool' test, instead of the 'engineering and scientific' test stated by the Supreme Court in Connecticut Light & Power Co. v. FPC, 324 U.S. 515 * * * (1945), and F.P.C. v. South-

ern Cal. Edison Co., 376 U.S. 205 * * * (1964) (the *Colton* case) * * *.

* * * * *

* * *"We are not persuaded that *Colton* and *Connecticut* are applicable to rule out use by the FPC of the so-called 'power pool' test on the record before us. Scientific evidence can be circumstantial as well as direct.

"The use of the 'power pool' test was approved in both Indiana & Mich. Elec. Co. v. F.P.C., 365 F. 2d 180 (7th Cir. 1966) (I&M), cert. denied, 385 U.S. 972, 87 S. Ct. 509, 17 L.Ed.2d 435 (Dec. 6, 1966), and Arkansas Power & Light Co. v. F.P.C., 368 F.2d 376, 8th Cir., Nov. 7, 1966. In I&M, this court said: 'We think the Commission in holding that the important consideration in determining jurisdiction here is the integrated interstate pool character of the operation.' 365 F.2d at 184. And in *Arkansas*, the court said it was not prepared to say that 'detailed tracing studies are a sine qua non' to federal jurisdiction, where there is an interstate 'pool assist' operation."

The Court below would distinguish these cases primarily on the ground that they involved Commission jurisdiction over sales for resale, whereas here the Commission's assertion of jurisdiction is only over transmission by FPL. But this factual difference does not have the legal consequences asserted by the Court below. In both situations, the basic issue concerned the existence of "interstate commerce" within Section 201(b) of the Federal Power Act. Patently, the principles in which the Courts found interstate commerce in the *Indiana & Michigan* line of cases are also pertinent to the determination whether FPL's transmission of power here is in interstate commerce.

The invalidity of the Court's distinction is further evident from this Court's decision in *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950). In affirming in that case the Commission's holding that a company which transported within a single

state, but did not sell for resale, gas moving in interstate commerce was subject to its jurisdiction under the parallel provision of the Natural Gas Act, this Court noted (*Id.* at 468):

> "As we pointed out in Panhandle Eastern Pipe Line Co. v. Public Service Comm., 332 U.S. 507, 516, * * * § 1(b) made the Natural Gas Act applicable to three separate things: '(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.' *And throughout the Act 'transportation' and 'sale' are viewed as separate subjects of regulation. They have independent and equally important places in the Act.*" (Emphasis supplied.)

3. The question presented by the Commission's petition is important not only because of its impact upon the means available to it for determining the scope of its own jurisdiction (Pet., pp. 10-12), or because of its bearing on the status under the Federal Power Act of FPL which, in addition to being the largest electric utility in Florida, ranked ninth nationally in 1965 in revenues, fourteenth in investments in gross electric utility plant, and sixteenth in kilowatt hour sales (see Pet. App. C, pp. 39-40). It is also important because in effect it determines whether the Commission may order FPL to interconnect with others, particularly municipally-owned utilities in Florida, as provided in Section 202(b) of the Federal Power Act.

Throughout its National Power Survey (1964), the Commission repeatedly noted (particularly, p. 170, *et seq.*) that interconnection and coordination among electric utilities are highly desirable and to be fostered at all levels and at every opportunity since they open the way for many and valuable benefits, not the least of which arise from reduced overall generating requirements and lower unit costs achievable in the planning and construction of new facilities. Indeed, "[p]articipation of the small systems in the benefits of coordination and a continuous search for means of broadening this participation are fundamental if these systems are

to continue to provide low cost power to their consumers and make the most efficient use of our fuel and capital resources." (Survey, p. 267)

Because of the unique peninsular nature of Florida, the small Florida utilities are peculiarly dependent for interconnections and coordination upon other utilities in Florida, in particular upon FPL, whose operations extend along most of the Florida east coast. As pointed out by the Commission (Pet. App. C, p. 49):

> "As the largest electric utility in the State of Florida, and as one of the major electric utilities in the United States, FPL's importance in insuring the increased reliability of interconnected power systems in Florida and in adjoining states is self-evident."

In contrast, FPL has in the past declined voluntarily to sell power to any municipal utility in Florida. An example of this is the case of Clewiston, intervenor before the Commission, as described in the findings of the Hearing Examiner (Pet. App. D, pp. 87-89).[4] Located only three miles from FPL transmission lines, five times it requested a direct connection and service and each time was refused. Moreover, FPL sought to utilize Clewiston's need to effect a take-over by FPL of Clewiston's system. The Examiner found that it was "contrary to company policy" to "sell to a municipal at wholesale except in the case of furnishing an emergency supply" (Pet. App. D, p. 88).

This policy is also reflected in FPL's reluctance to interconnect and exchange power with municipal systems, such as Gainesville. In testifying in opposition to a bill which would have amended the Federal Power Act to eliminate,

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[4] Clewiston's complaint case against FPL was settled by a settlement eliminating one of the two middlemen between Clewiston and FPL and reducing Clewiston's cost of purchased power by about 30%. Pet. App. C, p. 37, fn. 1; see also, *City of Clewiston v. Florida Power & Light Co.*, 36 FPC 17 (1966).

inter alia, FPC jurisdiction over FPL, the representative of the Florida Municipal Utilities Association[5] pointed out:

> "Mr. Robert H. Fite, president of Florida Power & Light Co., in his prepared statement of June 8, 1967, to this committee emphasized that only 1 percent of the company's revenues is derived from wholesale contracts, and that these are only with REA co-ops.
>
> "The reason for this low percentage is simply because Florida Power & Light Co. refuses to sell wholesale power to municipal utilities within reach of its lines; otherwise there would be a much larger percentage of wholesale sales.
>
> "This policy has forced the municipal utilities to rely upon isolated generating systems, and thus both the municipals and FP&L have been deprived of the advantages of energy exchange, pooling, and coordination." (Hearings before the Committee on Commerce, United States Senate, 90th Congress, 1st Session, on S. 1365, June 1967, Serial No. 90-23, p. 167.)

Finally, review of the holding below is important to eliminate an incentive to FPL (and other utilities in the country) to distort the engineering of their systems in order to escape Commission jurisdiction as permitted by the decision below. Indeed, as if in anticipation of the holding below, FPL, within two months of the Commission's initiation of the instant proceeding, dismantled an interconnection with Florida Power at White Springs, Florida, about twenty miles from the Georgia border, through which Florida Power delivered interstate power received from Georgia Power

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[5]Comprised of the 34 municipal utilities serving over 1,000,000 people, or about 25% of Florida's population.

Company (Tr. 84; see R. 186).[6] As a result of this dismantling, there is a 5-mile gap between the two systems, with the first connection between the two systems at Sanford, Florida, well down the peninsula. Thus, where once the two systems were connected in a loop with power feeding between both systems at either end of their transmission systems, now the FPL line from Sanford to Live Oak dangles as a radial line.

The system map also shows that whereas Florida Power has several interconnections with Georgia Power west of Jennings, Florida, there are no such interconnections with Georgia Power in the area east of Jennings which is served by FPL. Since such lack of interconnection apparently is traceable to FPL's policy to avoid FPC jurisdiction, reinstatement of the Commission holding that FPL is a public utility subject to the Federal Power Act would destroy that reason for FPL's not seeking the interconnections plainly indicated by engineering criteria.

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[6]For the convenience of the Court, we have reproduced in the appendix the system map set out at page 186 of the joint appendix below. Florida Power's lines are those which run southeast from Jasper through Fort White to Sanford. FPL's line run from Sanford through Palatka, Starke, Lake City, and terminate at Live Oak. Near Live Oak the lines of the two systems cross, but do not interconnect.

CONCLUSION

The petition for a writ of certiorari of the Federal Power Commission in this case should be granted.

Respectfully submitted,

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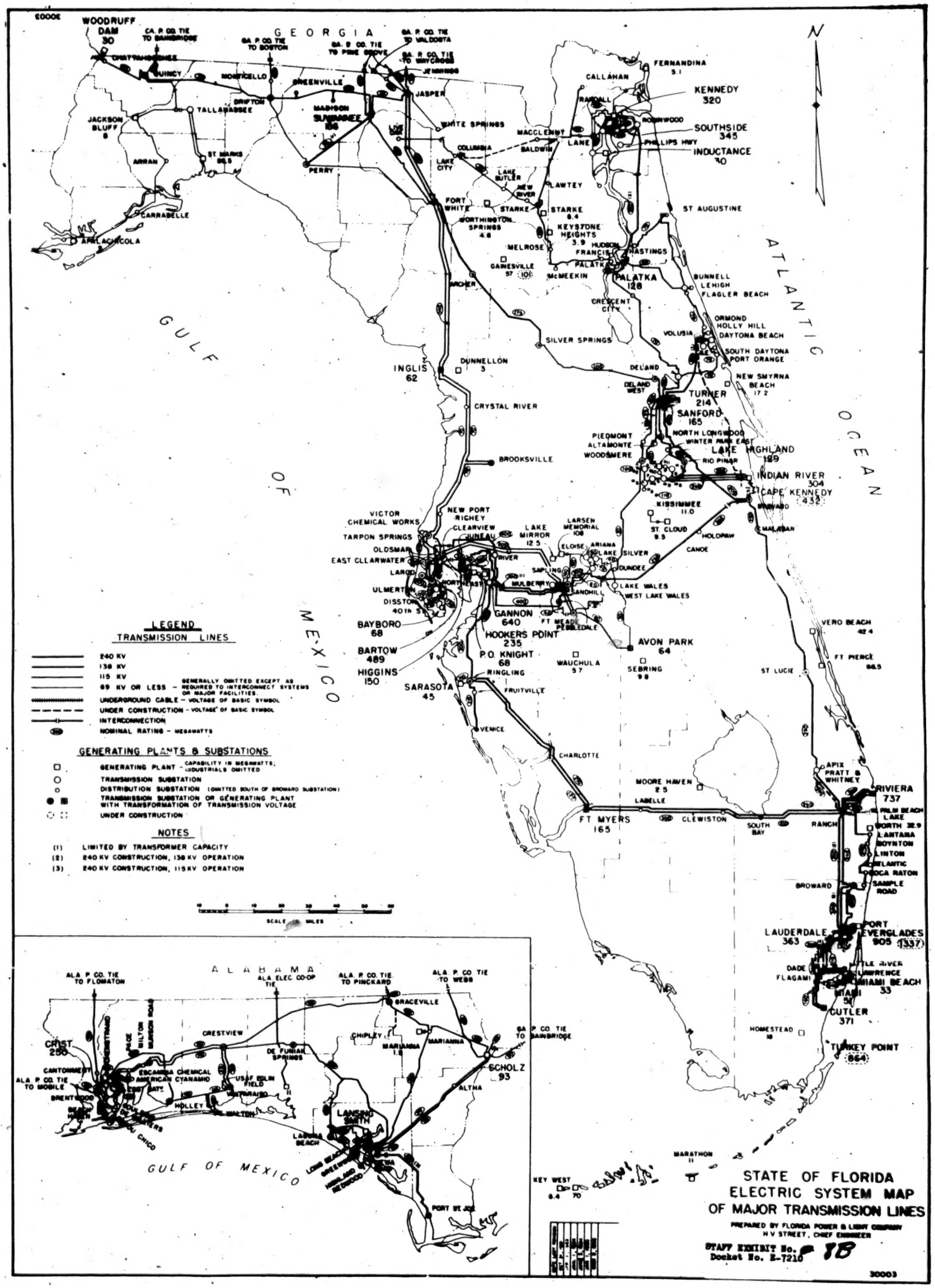
WOODRUFF DAM 30
GEORGIA
ALABAMA
GULF OF MEXICO
ATLANTIC OCEAN
LEGEND
TRANSMISSION LINES
240 KV
138 KV
115 KV
69 KV OR LESS – GENERALLY OMITTED EXCEPT AS REQUIRED TO INTERCONNECT SYSTEMS OR MAJOR FACILITIES.
UNDERGROUND CABLE – VOLTAGE OF BASIC SYMBOL
UNDER CONSTRUCTION – VOLTAGE OF BASIC SYMBOL
INTERCONNECTION
NOMINAL RATING – MEGAWATTS
GENERATING PLANTS & SUBSTATIONS
GENERATING PLANT – CAPABILITY IN MEGAWATTS; INDUSTRIALS OMITTED
TRANSMISSION SUBSTATION
DISTRIBUTION SUBSTATION (OMITTED SOUTH OF BROWARD SUBSTATION)
TRANSMISSION SUBSTATION OR GENERATING PLANT WITH TRANSFORMATION OF TRANSMISSION VOLTAGE
UNDER CONSTRUCTION
NOTES
(1) LIMITED BY TRANSFORMER CAPACITY
(2) 240 KV CONSTRUCTION, 138 KV OPERATION
(3) 240 KV CONSTRUCTION, 115 KV OPERATION
SCALE IN MILES
STATE OF FLORIDA
ELECTRIC SYSTEM MAP
OF MAJOR TRANSMISSION LINES
PREPARED BY FLORIDA POWER & LIGHT COMPANY
H V STREET, CHIEF ENGINEER
STAFF EXHIBIT No. 8B
Docket No. E-7210
30003